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No. 84-

IN THE

Supreme Court of the United States

October Term, 1984

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether there is the plurality of actors required to establish a violation of Section 1 of the Sherman Antitrust Act, when the alleged conspirators are an insurance company, one of its general agents (a corporation) and an officer of each of those corporations?

II. Whether a classic group boycott, with a life insurance general agent as target, can exist if the only participants in the alleged concerted refusal to deal are, on the suppliers level, a single life insurance company and one of its senior officers, and on the distributor level a corporation, and one of its principal officers, seeking designation as the successor general agent in the territory in which the target has exclusive rights?

III. Whether the *per se* antitrust violation analysis should be applied to an agreement between an agent and its life insurance supplier to terminate the supplier's only other agent in a particular territory, where no price control factor is involved?

IV. Whether a contract by a life insurance company appointing a general agent for soliciting applications for life, health and accident insurance is part of the "business of insurance" within the meaning of the McCarran-Ferguson Act?

PARTIES TO THE PROCEEDINGS

Petitioners Crown Life Insurance Company and Clarke Burton Lloyd were appellees/cross-appellants below on the issues presented for review.[1] Clark Burton Lloyd is an individual, a Canadian citizen and a resident of Chicago, Illinois. Respondent Malley-Duff & Associates, Inc. was appellant/cross-appellee below on the issues presented for review. Malley-Duff & Associates, Inc. is a Pennsylvania corporation which has its office in Pittsburgh, Pennsylvania.

Crown Life Insurance Company is a partially owned subsidiary of Extendicare, Inc., a publicly owned corporation with its headquarters in Toronto, Ontario, Canada.

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1. The other parties who were appellees/cross-appellants below are Agency Holding Corporation, an Illinois corporation, Agency Holding Corporation, an Ohio corporation and Kerry Patrick Craig, an individual. These parties are seeking review by this Court under a separately filed petition.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Crown Life Insurance Company and Clarke Burton Lloyd respectfully request that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Third Circuit entered on May 7, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (A1-A33) is reported at 734 F.2d 133. The District Court's ruling granting Petitioners' motion for a directed verdict on the antitrust claims (C1-C10) is not officially reported. The order relating to post-trial motions (B1-B2) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1984. Petitioners filed a timely petition for

rehearing and a suggestion for *en banc* consideration. On June 4, 1984, these were denied (D1-D2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), provides in relevant part:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to

the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

STATEMENT OF THE CASE

1. Proceedings Below

Respondent Malley-Duff & Associates (hereinafter "Malley-Duff"), was general agent in the Pittsburgh area for Petitioner Crown Life Insurance Company (hereinafter "Crown"), a Canadian corporation engaged in the business of selling life, health and accident insurance, under a general agency contract which contained the following provision:

> This agreement may be terminated on one month's notice by either party and such notice will be deemed to be given when a registered letter containing the notice is mailed, addressed to the party entitled to the notice at the party's last known address.

Under date of January 11, 1978, Crown wrote by registered mail to Malley-Duff giving notice of termina-

tion pursuant to the above quoted provision, effective one month from the date of mailing the letter. Opinion, A9.[2]

On April 5, 1978, Malley-Duff filed an action against Crown and Lloyd and Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio, Crown's general agents in Chicago and Cleveland, and an individual, Kerry Patrick Craig (hereinafter "Craig"), complaining about the termination of its general agency contract with Crown Life, and setting forth eight counts (Civil Action No. 78-373-W.D. Pa.). This action asserted claims under the federal antitrust laws for conspiracy and monopolization and, under the common law of Pennsylvania, for breach of contract, malicious interference with the contract, conspiracy, concerted refusal to deal and for punitive damages. At the conclusion of Malley-Duff's evidence, a directed verdict was granted by the trial court in favor of all of the defendants on each of the counts asserting a violation of the antitrust laws and the count charging breach of contract. The other common law claims were permitted to go to the jury. The jury found that there was no liability for tortious interference with a contractual relation and no liability for a conspiracy with the intent to injure, and refused to assess punitive damages. The defendants were found to be liable in the amount of $900,000 on a theory of conspiracy to tortiously interfere with a contract.

Both parties appealed to the Third Circuit. The Third Circuit reversed the trial court, reinstated the antitrust counts and threw out the jury verdict against the defendants. *See* Opinion, A1-A33.

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2. References to "Opinion" are to the Third Circuit's decision in this case, a copy of which is contained in Appendix A.

2. Factual Background

On January 11, 1978, Crown wrote to Malley-Duff giving notice of its intent to terminate Malley-Duff as its general agent in Pittsburgh pursuant to the express provisions of the general agency contract. Opinion, A9. Crown had repeatedly warned Malley-Duff that its representation of Crown in the Pittsburgh market had been grossly inadequate. Despite these warnings, Malley-Duff's production continued to lag. On August 19, 1977, Petitioner Lloyd wrote Malley-Duff and set forth a standard of production that was expected of Malley-Duff in order to retain its status as the Crown Life general agent in Pittsburgh. Opinion, A8. This warning was repeated by letter two months later. Malley-Duff failed to improve its marketing efforts. Lloyd recommended that Malley-Duff be terminated as general agent. This recommendation was adopted. Upon the request of Malley-Duff the termination was reconsidered by Crown, but Lloyd's superiors, Michael Hutchison, Marketing Vice President of Crown and Robert Dowsett, President of Crown, adhered to the decision to terminate Malley-Duff.

During the years immediately prior to the decision to terminate Malley-Duff, the production of that agency had leveled off. This leveling of production occurred at a level just in excess of five million dollars annually. That figure represents the threshhold at which a Crown general agent is rewarded with a bonus, in addition to regular commissions, the bonus being computed on the $5,000,000, as well as on any additional production. The production level regularly attained by Malley-Duff indicated that once this threshhold was attained and the bonus received, no further effort was expended. Crown recognized this fact and urged Malley-Duff to increase its penetration in the Pittsburgh market. These requests

went unheeded and Crown then instituted production quotas.

Testimony elicited by counsel for Malley-Duff at trial and exhibits introduced into evidence by Malley-Duff in this action preclude Malley-Duff from asserting that there existed any competition between Malley-Duff and the agency operated by Jules Ehrman, another insurance agency operating in Pittsburgh. They also preclude Malley-Duff from asserting that Lloyd had an ownership interest in Agency Holding Corporation.

At the trial, Malley-Duff called as its witness, as for cross examination, one of the defendants, Clarke Lloyd. To questions posed by Malley-Duff's counsel, Lloyd testified that while the Ehrman Agency operated independently, it had operated as a personal producing agency. (F6-F9). Its dealings with independent agents and brokers were restricted, by the terms of its agreement with Crown, to only three or four brokers with whom Jules Ehrman had a family relation or a long term business association. The Ehrman Agency was not a brokerage general agency; it was only after the Ehrman Agency joined with a new corporate entity, EROC, that Ehrman was permitted to search for independent agents or brokers. (F9). Lloyd further testified that even if Ehrman had contacted brokers other than the few brokers to which he was restricted, any business which resulted from such efforts would have been transferred to the brokerage general agent for the Pittsburgh area, Malley-Duff. (F9-F12). No evidence exists to contradict the fact that the Ehrman Agency was not a brokerage general agent but rather a personal producing agent. This uncontradicted testimony of a witness called by Malley-Duff is conclusive to establish the absence of competition between the Ehrman Agency and Malley-Duff.

Additionally, at the trial Malley-Duff offered into evidence Plaintiff's Exhibit 3446. This document consists of a cover letter from Lloyd to all Crown general agents and five pages of data on the sales levels and market penetration of the various Crown general agencies during 1977, the last year Malley-Duff was Crown's brokerage general agency in Pittsburgh.[3] The cover letter, dated June 21, 1978, which was sent shortly after the termination of Malley-Duff, stated that the national average for Crown general agencies in 1977 was .53% of the United States market for life insurance, and sets forth Crown's policy that the minimum target for each agency should be a penetration level of .5% of the market. Malley-Duff's level of market penetration of 1977 was far below this minimum target level. Malley-Duff had a market share of only .11% (H3). If Malley-Duff had had a market share of .5%, it would have sold $25,000,000 of insurance. That same page of this document indicates that the Pittsburgh Center Agency (Crown's internally used title for the Jules Ehrman Agency) was a personal producing agent, not a brokerage general agent with an assigned territory. (H3). Malley-Duff's own exhibit thus indicates that whereas Malley-Duff was a brokerage general agency, the Ehrman Agency was a personal producing agent, and that Malley-Duff's penetration of the Pittsburgh market was less than one-fourth of what it had to be to equal the average of all Crown's United States agencies.

Malley-Duff is also precluded from claiming that Lloyd had any ownership interest in Agency Holding. At

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3. The cover letter and excerpts of the data relating to Malley-Duff and Ehrman are included in Appendix H. Crown's internally used title for Malley-Duff was "Pittsburgh EE" as is shown on page H3.

the trial, Kerry Craig was called as a witness by Malley-Duff. While on the stand as part of Malley-Duff's case in chief, Craig testified that 100% of the stock of Agency Holding Corporation was to be owned by Craig (F1-F2). Likewise, Lloyd, who was also called as a witness by Malley-Duff, testified that there was no agreement that Lloyd was to receive an interest in Agency Holding (F12-F13). Lloyd further testified that he never had any financial interest in the Pittsburgh agency operated by Craig and was never promised any such interest. (F5; F3-F4). At a hearing on Malley-Duff's motion for sanctions, Craig, called by Malley-Duff as for cross-examination, testified to the same effect (G3-G11). Malley-Duff having called these witnesses during its case in chief, is bound by such testimony unless the testimony is contradicted. Malley-Duff offered no direct evidence to contradict this testimony.

REASONS FOR GRANTING THE WRIT

I. There is no plurality of actors to establish a violation of Section 1 of the Sherman Act when the alleged conspirators are an insurance company, its general agent (a corporation), and an officer of each of those corporations.

The Third Circuit's opinion here erroneously assumed that there was a plurality of parties sufficient to sustain a violation of Section 1 of the Sherman Act. This is in direct conflict with this Court's holding in *Copperweld Corp. v. Independent Tube Corp.*, __ U.S. __, 104 S. Ct. 2731 (1984) and the Tenth Circuit's decision in *Card v. National Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979).

At the trial of this case, Malley-Duff proceeded on the theory of a group boycott. Opinion, A11. To establish

an actionable violation of Section 1 of the Sherman Act, there must be sufficient plurality of actors. *Copperweld Corp. v. Independent Tube Corp.*, 104 S. Ct. 2731, 2741 (1984). In the instant case, there can be no plurality of actors because Crown, Lloyd, Agency Holding and Craig are all part of Crown's overall business structure. This Court made it clear in the *Copperweld* decision that there can be no concerted action, no conspiracy among the members of a single entity.

Additionally, "officers or employees of the same firm do not provide for the plurality of actors imperative for a Section 1 conspiracy. *Copperweld*, 104 S. Ct. at 2741. Thus, Lloyd as a vice-president of Crown was incapable of conspiring with Crown and Craig as president of Agency Holding was incapable of conspiring with Agency Holding.

Similarly, Agency Holding, Crown's general agent in Chicago and Cleveland, being part of Crown's overall business structure, was incapable of conspiring with Crown. As the court in *Card v. National Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979), held:

> [T]he General Agents Association, consisting as it did of general agents of National Life Insurance Company, was really a part of the National Life Insurance Company structure and they could not be regarded as conspirators. The same is true of the defendant Ryan and the defendant Leland. Ryan is a general agent for National Life Insurance Company and Leland is executive vice-president, so they cannot be effective conspirators either.

Id. at 834.

Accordingly, this Court should grant the present writ to resolve the conflict created by the Third Circuit's decision because it is contrary to the holdings of this

Court and of the Tenth Circuit on the question of whether there is a plurality of actors under Section 1 when the alleged conspirators are an insurance company, its general agent (a corporation) and an officer of each of those corporations.

II. An insurance company's termination of a general agency contract with one of its general agents cannot constitute a classic group boycott, even if the termination was in response to a request by the replaced agent's alleged competitor.

The Third Circuit in this case reversed the district court's grant of a directed verdict in favor of the defendants on the antitrust claims by holding there was a sufficient showing of the elements of a classic group boycott by Crown's termination of Malley-Duff as a general agent. This holding is contrary to a long line of cases of this Court and of other Circuits which have outlined the scope of classic group boycott violations.

In *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), the District of Columbia Circuit defined the "classic group boycott" as:

> a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates.

Id. at 1178 (footnote omitted).

Similarly, the Ninth Circuit in *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979), explained:

> In Sullivan, *Antitrust*, at 259 (1977), the author states: "If the *per se* rule respecting boycotts is to become coherent, we must recognize that it applies only where competitors engage together to inhibit others with whom they compete by depriving those others of elements needed in the competitive context." Here the concert of action was by a sole competitor and that competitor's parent company, and was in no way an agreement between competitors.

Id. at 387.

In the instant case there can be no "classic group boycott" to which the *per se* standard is applicable. Crown and Lloyd operated at a competitive level distinct from that of Craig and the companies with which Craig was associated. There is no "group" of competitors acting against Malley-Duff. Crown alone was in a position to deal with Malley-Duff. There was no concerted refusal to deal, and hence no boycott, as there were no other entities, other than Crown, which were capable of refusing to deal with Malley-Duff.

To constitute a concerted refusal to deal, there must be two or more entities, who are in a position to deal with the plaintiff, acting in concert in refusing to deal with the plaintiff. Such of the cases as do find that a boycott existed all involved two or more entities in a position to deal with the target joining in refusing to deal. Thus, in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), all of the Chevrolet dealers in Los Angeles banded together in an agreement to refuse to sell to discount dealers. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), involved approximately a dozen manufacturers of sound equipment all agreeing to refuse to sell to the plaintiff, a discount store. *National Society of Professional Engineers v. United States*, 435 U.S. 679

(1978), involved an association with thousands of members acting in concert, as did *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), three of the just four companies writing medical malpractice insurance in Rhode Island agreed with the fourth to refuse to deal with applicants for such insurance to enable the fourth to change its form of coverage from an "occurrence" to a "claims made" basis. The decision most often cited as illustrating an illegal boycott is *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941), which involved a concerted refusal, by 176 manufacturers of women's garments, to sell to retailers who bought from manufacturers pirating their original designs. In the case at issue, Crown was the only one of the alleged boycotters in a position to deal with Malley-Duff as a general agent. Thus, there was no, and could be no, concerted refusal to deal.

As was held in *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982), and the Third Circuit's opinion in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 (3d Cir. 1972), a single supplier or seller may cease to do business with one company and transfer his business to another and such a transfer is valid even if the successor may have solicited the transfer and even though the seller may have so agreed with the successor prior to seller's termination of the former distributor. Absent evidence of an intent to manipulate prices (and there is no such evidence in this case (see section III, *infra*,)) plaintiff must prove a reduction in competition. By replacing Malley-Duff with EROC as its general agent in Pittsburgh, Crown has merely substituted parties. Both before and after the termination of Malley-Duff there existed only one Crown brokerage general agent. The

Ehrman Agency, a personal production style agency, did not compete with Malley-Duff. Ehrman operated as a personal producing general agent and as such solicited directly from the ultimate policyholders; Malley-Duff, in contrast, was a brokerage general agent and solicited from brokers (F9). The two agencies operated on different planes. Malley-Duff failed to introduce sufficient evidence, even viewed in a light most favorable to it, to establish any reduction of competition as a result of the termination of Malley-Duff. In essence, the Third Circuit here, however, contrary to the holdings of the traditional group boycott cases, converted a group of alleged conspirators into a group of competitors.

Crown's decision to terminate Malley-Duff and the subsequent actions undertaken to implement that decision are absent any element of anticompetitive purpose or effect. This substitution of one business entity for another as general agent had no impact whatsoever on competition. The substitution of distributors, even at the behest of the successor entity, does not give rise to a *per se* violation under Section 1 of the Sherman Act. *Ark Dental Supply Co.*, 461 F.2d at 1094.

Where, as here, there is no group, there can be no group boycott. Crown alone dealt with Malley-Duff. Its decision to terminate Malley-Duff as its general agent was a vertical decision which, even if made at the urging of Craig, was a unilateral refusal to deal and not subject to the *per se* standard of liability.

Accordingly, the present writ should be granted because the Third Circuit's decision, contrary to the decisions of this Court and others, holds that a group boycott can exist where a single insurance company terminates its general agency contract with one of its general agents.

III. In the absence of a price control factor, there cannot be a *per se* violation when an insurance company terminates its general agent.

The Third Circuit's decision adopts for the first time the rule that a *per se* violation is established, even in the absence of a price control motivation,[4] when an insurance company terminates its general agent. This decision is in direct conflict with decisions of the District of Columbia, Second, Fourth, Seventh, Eighth and Ninth Circuits and with the clear implications of this Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, __ U.S. __, 104 S. Ct. 1464, *reh'g denied*, 104 S. Ct. 2378 (1984).

To establish a violation of the antitrust laws, a party must demonstrate the existence of either an anticompetitive purpose or effect. *See Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 80 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The concern of the antitrust laws is to protect the consumer interest in competition. *Reiter v. Sonotone Corp.*, 442 U.S. 330

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4. Because the Pennsylvania Insurance Department must approve premium rates and policy terms, there could be no competition as to the price or product here involved. As Respondent itself explained at the oral argument before the Third Circuit:

> There the agents who are involved cannot compete on the basis of price. We cannot vary the price of an insurance policy. It is regulated by State law. I can't charge less than Mr. Ehrman charges. I can't vary my price in response to what State Farm is putting out. Similarly we cannot vary the quality of our product. We're selling a policy that is approved by the State. There is no way that we can change the terms and conditions of that policy in response to competitive demands.

Transcript of Oral Argument, E2.

(1979); *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982).

To prove that a conspiracy or other form of agreement violates Section 1 of the Sherman Act, the plaintiff must show either that it falls in one of the categories of "per se" illegality or that it has an actual, or at least probable, anticompetitive effect. As the court in *Products Liability* recently stated:

> Agreements that are illegal per se are for the most part horizontal, that is, between competing sellers, which Crum & Forster and Paris are not. The former is an insurance underwriter, the latter an insurance agent. Their relationship is "vertical" —analogous to that between a manufacturer and his distributor. If multiple manufacturers or multiple distributors were involved, the agreement would have an admixture of the horizontal, as in *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 412-413 (6th Cir. 1982), but there is nothing of that sort here.

682 F.2d at 663.

In order to apply the *per se* categorization to a vertical relationship, as is involved in this case, two factors are crucial—horizontal impact and price control motivation. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979).

Because the Third Circuit's decision in this case eliminates price control motivation as a crucial factor to establishing a *per se* violation, that decision is in conflict with the decisions of six other Circuits and of this Court.

In *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, a case which as the Third Circuit noted involved "a fact situation similar to the

instant case," (Opinion, A13-A14) the Seventh Circuit Court of Appeals stated:

> *Vertical agreements are illegal per se only if their purpose is price fixing.* Thus, if Paris and Crum & Forster had conspired to exclude Getzoff in order to increase the price of insurance, then *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), ... would be authority for holding that the defendants had committed a per se violation of Section 1 of the Sherman Act by a form of vertical price fixing. But in the absence of any evidence of intent to raise prices—and there is no such evidence in this case —an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se. To prevail in such a case the plaintiff must show that the refusal to deal is likely to reduce competition. *See, Oreck Corporation v. Whirlpool Corp.*, 579 F.2d 126, 133-34 (2d Cir. 1978) (*en banc*). So even if Paris had said to Crum & Forster, "it's Getzoff or me—you must choose between us", and Crum & Forster, knuckling under to the threat, had refused to appoint Getzoff as an insurance agent who would have competed with Paris, there would still be no violation of section 1 without some showing of adverse effect on competition.

Products Liability, 682 F.2d at 663 (emphasis added). The Seventh Circuit cited the Third Circuit's decision of *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979) for the very proposition—price control motivation is an essential factor—that the Third Circuit here cites *Cernuto* as rejecting. (Opinion, A13).

In *Cernuto*, plaintiff, a discount retailer, alleged that a supplier of kitchen cabinets and its sales representative

terminated plaintiff's supply contract at the urging of a competing retailer who complained about plaintiff's price competition. The Third Circuit emphasized *two* factors as absolutely crucial to its finding that these allegations established a *per se* violation, and used one of them—the price competition factor—to distinguish the *Cernuto* fact situation from two cases decided by other federal circuits. The *Cernuto* court admitted that the cases decided by the two other circuit courts suggested "a result contrary to the one we reach today." 595 F.2d at 169.

The factor that does exist in *Cernuto* and arguably in the instant case is the horizontal impact of the action taken by the supplier. The other "[e]qually important" factor, the one missing from the instant case, was that "the motivating factor in [the competing retailer's] efforts ... was ... price." 595 F.2d at 168. "By prevailing upon [its supplier] and [the supplier's representative] to terminate their contract with plaintiff, the competing retailer effectively eliminated the threatened competition and was able to maintain prices at its own preferred levels." *Id.* at 169.

The two cases from other federal circuits distinguished by the *Cernuto* court on the basis of the price control motivation factor were *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) and *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978).

The *Cernuto* court noted that, in both *Packard* and *Oreck*, just as arguably in the instant case, the horizontal impact factor was present.[5] But just as in the instant

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5. The Third Circuit in *Cernuto* stated:

There, the most successful car dealer in the Baltimore area threatened to cease selling the manufac-

case, the "[e]qually important" price control motivation factor was missing. "[I]n *Packard* the dealer was seeking not to fix prices, but to secure an exclusive franchise, a form of marketing strategy that is not without certain overall competitive advantages." 595 F.2d at 169-170. "[I]n *Oreck* there was no proof that Sears, the aggressive dealer, was inspired by price. In fact, Sears was selling Whirlpool vacuum cleaners at prices below those offered by plaintiff Oreck. Price control, then, was not the likely purpose of the Whirlpool-Sears agreement." 595 F.2d at 170.

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5. (Continued)
turer's automobiles unless the dealer's competitors were terminated and it was granted an exclusive right for the entire region .... Notwithstanding the horizontal impact of the dealer's action, the court reversed a jury verdict for plaintiff and refused to find an antitrust violation on the part of the manufacturer. A more recent case is *Oreck Corp. v. Whirlpool Corp.*, [ ] There, the Court of Appeals for the Second Circuit, sitting *en banc*, reversed a jury verdict for a plaintiff that had been deprived of its profitable trade in Whirlpool vacuum cleaners, as a result of an agreement between Whirlpool and Sears & Roebuck Co., the plaintiff's principal competitor. The court found the trial judge's instructions to the jury, which left open the possibility of finding a *per se* violation on such facts, to be erroneous, and remanded for a new trial—presumably under a rule of reason analysis.

Cernuto, Inc. v. United Cabinet Corp., 595 F.2d at 169 (footnote omitted). The rule of reason cannot apply to the instant case because as the district court explained "there is no evidence from which a jury could conclude that the defendants conspired with the purpose or effect of producing adverse, anticompetitive effects within relevant product and geographic markets." (C2, C4). Respondent itself conceded at oral argument before the Third Circuit that its case was primarily brought as a *per se* claim. Transcript of Oral Argument, E3.

The Third Circuit in this case held that a *per se* violation can be established merely by proving the horizontal impact factor, as opposed to proving a horizontal conspiracy, which is not present in this case. The Third Circuit's decision thus moves a giant step beyond and outside the holdings of the Seventh Circuit in *Products Liability* and its own precedent in *Cernuto* by eliminating completely one of the two factors *Cernuto* held was equally important to a finding of a *per se* violation. The decision ignores the *Cernuto* requirement that price control motivation be present *in addition to* horizontal impact. In its decision, the Third Circuit says that the plaintiff's "theory seems congruent with the observation in *Cernuto*" because plaintiff introduced evidence to prove "an agreement that produced an impact on the horizontal level." Opinion, A14. In fact, plaintiff's theory can never be congruent with *Cernuto* because price control motivation can never be present in the instant case.

If horizontal impact was the only factor required to apply the *per se* standard to vertical restraints, then every vertical restraint would be subject to *per se* scrutiny because horizontal impact is always going to be present when there are two or more people dealing on the same level of the competitive strata. Such a finding would completely undermine this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), where this Court held that all non-price vertical restraints are governed by the rule of reason standard.

The Third Circuit's decision here is also in direct conflict with decisions in the Fourth, Eighth and Ninth Circuits which have adopted the same approach and rule discussed in *Products Liability*. *See JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.), *cert. denied*, __ U.S. __, 104 S. Ct. 106 (1983);

Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207 (4th Cir.), *cert. denied*, __ U.S. __, 104 S. Ct. 242 (1983). The Ninth Circuit in *JBL Enterprises, Inc.*, relying on *Cernuto*, held in order for the plaintiff to establish a *per se* violation, it would have to allege that its competitor prevailed on the supplier to terminate plaintiff in order to eliminate actual or potential price competition. 698 F.2d at 1015. The Ninth Circuit affirmed the district court's grant of summary judgment and found that the *per se* rule was not applicable because the price factor was not present. 698 F.2d at 1015.

Similarly, the Fourth Circuit in *Bostick*, held that "a finding of a *per se* violation of Section 1 would result from a factual determination that the termination was in furtherance of competitors' desires to eliminate a price-cutting rival." 702 F.2d at 1215. Additionally, the Fourth Circuit explained:

> "[W]e think it is important to distinguish between a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased inter-brand competition. A restraint imposed by the former conspiracy would be horizontal in nature and *per se* illegal, while one imposed by the latter would be vertical and analyzed under the rule of reason."

Id. (quoting, Donald B. Rice Tire Corp. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981)).[6]

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6. See also *Battle v. Lubrizol Corp.*, 673 F.2d 984, 989-90, 993 (8th Cir. 1982), *aff'd by an equally divided court, Battle v. Watson*, 712 F.2d 1238 (8th Cir. 1983) (*en banc*), *cert. denied*, __ U.S. __, 104 S. Ct. 1718 (1984),

Moreover, the Third Circuit's decision in this case is contrary to the clear implications in this Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, __ U.S. __, 104 S. Ct. 1464, *reh'g denied*, __ U.S. __, 104 S. Ct. 2378 (1984) where this Court noted:

> The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-409, 31 S. Ct. 376, 383-385, 55 L.Ed. 502 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L.Ed.2d 568 (1977).

104 S. Ct. at 1469 (footnote omitted). As discussed above, the rule of reason test was not and could not be met in this case.

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6. (Continued)
wherein the Eighth Circuit noted that price and price competition were the key factors in *Cernuto* and went on to hold that because those very factors were present in the case before the court, a *per se* violation could be established; and *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235, 1237 (8th Cir. 1983) (*en banc*), *cert. denied*, __ U.S. __, 104 S. Ct. 1707 (1984), where the court stated "a *per se* violation of section one would be established by proof that Star Cooler [the manufacturer] terminated its relationship with Roesch [the distributor] at the request of competing distributors and that the termination was in pursuit of a price related end."

Accordingly, this Court should grant the present writ to resolve the conflict created by the Third Circuit's decision because said decision is contrary to the holdings of the District of Columbia, Second, Fourth, Seventh, Eighth and Ninth Circuits and to the clear implications by this Court on the question of whether there can be a *per se* violation in an insurance company/general agent relationship in the absence of both the allegation of or proof of a price control factor.

IV. Transactions between an insurance company and its agents constitute the "business of insurance" under the McCarran-Ferguson Act.

The contention of Crown and Lloyd that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), exempts them from antitrust liability was summarily dismissed by the Third Circuit in this case as follows:

> There is no merit to this contention. First, McCarran-Ferguson only exempts "the business of insurance," i.e., primarily the insurer-insured relationship, from the antitrust laws and not all the actions of insurers generally. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Second, the Act itself specifically excludes from the exemption "any agreement to boycott, coerce, or intimidate . . . ." 15 U.S.C. § 1013(b). Thus to the extent that Malley-Duff argues that appellees' conduct constituted a group boycott, appellees may not use McCarran-Ferguson as a shield.

Opinion, A20.

The Third Circuit below misread this Court's opinion in *Royal Drug*. There the majority (the Court divided 5 to 4) opinion discussed, 440 U.S. at 224 n.32, the question whether transactions between an insurer and its agents,

including independent agents, are the business of insurance, and concluded that such transactions, between insurers and agents, in the language of the dissenting opinion (*id.* at 245) might fall within the business of insurance. The dissenting opinion states:

> But the Court's attempt to limit its concession to horizontal transactions still conflicts with the legislative history. Compelling evidence is the fact that Congress actually rejected a proposed bill to limit the exemption to agreements between insurance companies. S. 12, 79th Cong., 1st Sess. (1945). See n. 3, *supra.* Moreover, vertical relationships between insurance companies and independent sales agencies were a subject of the indictment in *United States v. South-Eastern-Underwriters Assn.*, 322 U.S. 533, 535 (1944), were the object of discussion in the House, 90 Cong. Rec. 6538 (1944) (remarks of Cong. Celler), and were expressly included as part of the "business of insurance" in an early draft of the Act, *Id.* at A4406 (NAIC bill, 4(b)(5)). Again, the Court concedes that such transactions, between insurers and agents, might fall within the "business of insurance," despite the inconsistency with the Court's own theory. *Ante,* at 224-225, n. 32.

440 U.S. at 244-45. Both the majority opinion and the dissent were in agreement that the business of insurance includes both the underwriting and the spreading of risks. As contracts engaging agents to solicit the purchase of insurance is necessary for an insurance company to spread the risk and thus obtain an average selection of risks, it seems clear that an insurance company's contracts with its agents is part of the business of insurance.

The holding that *Royal Drug* prevents the application of the McCarran-Ferguson Act to the situation in the

case at bar is wrong, not only as a misconstruction of *Royal Drug*, but also because it is in conflict with decisions in the Fifth and Tenth Circuits.

Thus in *Card v. National Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979), the court held that the McCarran-Ferguson Act exemption applied in a case of an insurance company terminating its general agent's contract, and further held that the boycott exception to the McCarran-Ferguson Act's exemption from antitrust liability did not cover a case where the plaintiff claimed that the insurance company, an association of the insurance company's general agents, an individual general agent and an officer of the insurance company conspired to terminate the plaintiff's general agency contract. In the case at bar, the alleged co-conspirators were the insurance company (Crown Life), one of its officers (Lloyd), two of its general agents (Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio) and one of its individual general agents (Kerry P. Craig) also a stockholder and officer in the two Agency Holding eorporations.

Also, the Court of Appeals for the Fifth Circuit in the case of *Thompson v. New York Life Insurance Co.*, 644 F.2d 439 (5th Cir. 1981), held that provisions in an insurance agency contract precluding the agent from engaging in any other business or occupation for remuneration or profit without the written consent of the insurance company were exempt from antitrust liability as being part of the business of insurance under the provisions of the McCarran-Ferguson Act.

Accordingly, this Court should issue the present writ to review the question of whether transactions between an insurance company and its agents falls within the business of insurance under the McCarran-Ferguson Act.

CONCLUSION

A writ of certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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